

Western New England Law Review

Volume 77 (1984-1985)
Issue 3

Article 12

1-1-1985

RICHARD RAYSMAN AND PETER BROWN: COMPUTER LAW: DRAFTING AND NEGOTIATING FORMS AND AGREEMENTS

Dennis Caraher

Follow this and additional works at: <http://digitalcommons.law.wne.edu/lawreview>

Recommended Citation

Dennis Caraher, *RICHARD RAYSMAN AND PETER BROWN: COMPUTER LAW: DRAFTING AND NEGOTIATING FORMS AND AGREEMENTS*, 7 W. New Eng. L. Rev. 801 (1985), <http://digitalcommons.law.wne.edu/lawreview/vol7/iss3/12>

This Book Review is brought to you for free and open access by the Law Review & Student Publications at Digital Commons @ Western New England University School of Law. It has been accepted for inclusion in Western New England Law Review by an authorized administrator of Digital Commons @ Western New England University School of Law. For more information, please contact pnewcombe@law.wne.edu.

COMPUTER LAW: DRAFTING AND NEGOTIATING FORMS AND AGREEMENTS, BY RICHARD RAYSMAN AND PETER BROWN. NEW YORK: LAW JOURNAL SEMINARS-PRESS 1984.

*Reviewed by Dennis Caraher**

In the ever-changing world of data processing, it is comforting to know that some things remain constant. Although published nine years ago, an eternity in the computer business, Dick Brandon and Sidney Segelstein's *Data Processing Contracts*¹ continues to be the authority for attorneys representing computer system purchasers. That this book continues to demand respect attests to more than the fact that Brandon and Segelstein were two of the most knowledgeable authorities on computer contracts; it also shows that the computer contracting field is not nearly as volatile as the computer industry in general. While a 1976 book on computer technology would now be severely dated, this computer contract treatise has retained its usefulness because its main focus is on general contract principles and how these principles apply to a specific industry.

Data Process Contracts, however, is not without its deficiencies. While a computer contract lawyer need not be a technological wizard, he will need a minimal amount of knowledge about computer and data processing in order to best serve his client. Brandon and Segelstein assume that the reader would gain this knowledge elsewhere. Another problem with *Data Processing Contracts* is that its major focus is on how the actual contract should read, and while the authors do discuss the negotiation process,² they do not give the subject detailed treatment.

Another drawback to *Data Processing Contracts* is that it contains no legal citations. Since the book was written for anyone involved in the purchase of computer equipment or services, this is not surprising. A lawyer will have to look elsewhere for specific legal authority.

There is one other matter that computer vendors would regard as

* Partner, Matthews & Caraher, Springfield, Massachusetts. B.A., Iowa State University, 1973; J.D. Western New England College School of Law (cum laude), 1983. Mr. Caraher specializes in the practice of computer law.

1. D. BRANDON & S. SEGELSTEIN, *DATA PROCESSING CONTRACTS—STRUCTURE, CONTENTS, AND NEGOTIATION* (1976).

2. *Id.* at 21-37.

a deficiency in *Data Processing Contracts*: it was written for the benefit of the computer user. The object of the book is to set out the ideal contract for the buyer.

Recognizing the need for a more complete treatment of the computer contract area, in 1981 Joseph Auer and Charles E. Harris wrote *Computer Contract Negotiations*.³ As the title suggests, this book's primary focus is on the negotiation aspect of the contracting process. Auer and Harris wrote for the same audience as did Brandon and Segelstein: the prospective computer buyer who already has a basic knowledge of the data processing terms. Also, as in *Data Processing Contracts*, there are no legal citations. This is not to say that the computer contract lawyer could not benefit from the book. For attorneys who get involved in the purchasing process early, as should be the case, this book is essential.

Too often, the client will use the lawyer only to review the contract. By that time, there is little the attorney can do to help his client. The buyer will be all but legally committed to buying the product, and since the vendor will know this, the buyer will be without any negotiating leverage. Without this leverage, the attorney will be unsuccessful in getting a favorable contract for his client.

Computer Contract Negotiations contains invaluable advice for the attorney who is involved in the early stages of purchasing or leasing computer hardware, software, or services. It lists the various "ploys" that vendors will use in order to make a sale and how to deal with these tactics.⁴ Auer and Harris also devote a substantial amount of attention to the preparation of a request for proposal (RFP),⁵ the document that the buyer sends to potential vendors which specifies the buyer's requirements and invites the vendor to propose a system to meet those requirements. Often the RFP sets the tone for the entire vendor/purchaser relationship so it must be drafted with great care. Auer and Harris's guidelines⁶ and sample RFP⁷ are very helpful.

Furthermore, Auer and Harris discuss specific contract provisions,⁸ but their discussion is not as detailed nor as helpful as the treatment of this area in *Data Processing Contracts*. While the detail may be lacking, the authors partially compensate for this with their excel-

3. J. AUER & C. HARRIS, *COMPUTER CONTRACT NEGOTIATIONS* (1981).

4. *Id.* at 10-40.

5. *Id.* at 128-37.

6. *Id.*

7. *Id.* at 367-82.

8. *Id.* at 161-212.

lent checklists of contract provisions.⁹ The appendix sets out all of the contract clauses that would be relevant in a computer services contract,¹⁰ a third-party leasing contract,¹¹ and a turnkey system contract.¹² These lists are ideal for the attorney who is preparing or reviewing a contract.

Knowing that this checklist format was ideal for the computer contract lawyer was undoubtedly one of the reasons that led to the publication of *Computer Law: Drafting and Negotiating Forms and Agreements*, by Richard Raysman and Peter Brown.¹³ Not only does this book expand upon the checklist format, it also attempts to provide the lawyer with something that both of the previous books lacked: an overview of data processing concepts and definitions. The authors also recognize that the computer contract lawyer would like to see some legal authority for their propositions. Raysman and Brown's rare citations are not exhaustive, but at least they give the attorney a starting point.

Raysman and Brown, in their opening chapter,¹⁴ seek to allay the apprehensions of the lawyer who has been called upon to represent a client in a computer contract negotiation but who knows nothing about computers. "Broad technical experience" is not necessary, they write, but only "an understanding of the fundamental concepts involved in computer technology."¹⁵ The rest of the chapter is then devoted to defining those concepts.

One of the most common complaints about data processing professionals is that they don't speak English: they express themselves with such arcane terms as RAM, ROM, bits, and bytes. Raysman and Brown set out to be interpreters; however, they make technical statements such as: "[A] typical personal computer would have an RAM measured at 64K, i.e., the ability to randomly store 64,000 bits of information simultaneously."¹⁶ Unfortunately, the authors fail to define "K" and "bit." They are also guilty of using circular definitions,¹⁷ of

9. *Id.* at 208-10.

10. *Id.* at 323-34.

11. *Id.* at 334-42.

12. *Id.* at 342-45.

13. R. RAYSMAN & P. BROWN, *COMPUTER LAW: DRAFTING AND NEGOTIATING FORMS AND AGREEMENTS* (1984).

14. *Id.* at 1-1 - 1-25.

15. *Id.* at 1-2.

16. *Id.* at 1-3.

17. "The computer is a programmable machine that processes information." *Id.* at 1-3. The connotation of "programmable" can only be derived from some knowledge of computers.

using terms before they define them,¹⁸ and of providing incomplete definitions.¹⁹

The reader would be better served not only with a more complete treatment of the technological concepts, but also with an overview of the computer industry itself: what is going on now and what is likely to happen? The information becomes quickly obsolete, but since the authors recognize the problem, this section could be updated yearly.

The definitional section, while incomplete, is at least a start for the attorney new to the field. He will learn more about computers from Raysman and Brown than from Brandon, Segelstein, Auer, and Harris. In its second chapter, "The Computer Contracting Process," *Computer Law* does not compare so favorably with the other books. This chapter says little more than that the purchaser should identify his data processing needs before entering into any agreements.²⁰ Part of the problem with this section is that the authors have decided not to take sides. Unlike *Data Processing Contracts* and *Computer Contract Negotiations*, *Computer Law* is not pro-user. In the former two books, you will not find a statement that remotely approximates the following: "[v]endors should be careful that their proposals accurately portray the capabilities and limitations of the computer hardware or software being sold."²¹ The attitude of the Brandon and Auer books is that vendors already have the negotiating advantage and they don't need any more help. Raysman and Brown feel differently, however, and give the vendor equal attention. They obviously feel that their readers will be on both sides of computer sales agreements.

It is this even-handedness, however, that prevents their advice on noncontractual matters from being helpful. Whereas Brandon and Auer devote a substantial amount of attention to negotiating strategies, Raysman and Brown ignore the subject.

The shortcomings of *Computer Law* in its sections on technology and the precontracting process are more than offset by the subsequent chapters. Each type of computer contract²² is addressed in a separate chapter. The first parts of these chapters explain the various clauses that can be found in these contracts and the authors' footnote to legal

18. The term "application programs" is used before it is defined. *Id.* at 1-7 and 1-9.

19. "Professional quality printing" is an ambiguous phrase. *Id.* at 1-5. For instance, it could mean dot matrix, letter quality, or laser.

20. *Id.* at 2-2.

21. *Id.* at 2-9.

22. See, e.g., *id.* at 3-2 ("The Purchase Contract"); *id.* at 4-1 ("Hardware Maintenance"); *id.* at 8-1 ("Software Development"); *id.* at 9-1 ("Software Maintenance"); and *id.* at 10-1 ("Service Bureaus").

authority. The authors follow up these contract-clause explanations with checklists²³ and then with actual contracts. The chapter on hardware acquisition has a form contract for a turnkey system,²⁴ third-party master lease,²⁵ equipment lease with an independent sales organization,²⁶ and an equipment purchase from an independent sales organization.²⁷ The authors also offer contracts which are favorable for the buyer²⁸ and others which favor the vendor.²⁹ The contracts are clear, concise, and complete.

In addition to contract issues, *Computer Law* devotes several chapters to other aspects of computer law. One chapter is devoted to copyright and patent protection of computer programs.³⁰ The authors review the current status of the law and explain how to file for protection, even including a Form TX from the Copyright Office.³¹

Trade secrecy and its application to software is discussed in chapter eight and the authors include employee and customer nondisclosure and confidentiality forms.³²

The final chapter discusses a subject that will become of more interest as more individuals and companies become aware of their computer rights: computer litigation. Within a few years, this subject will deserve not only a chapter, but its own book. The authors discuss the various courses of action that may be available to the buyer³³ and how the user and vendor should go about building their cases.³⁴ The authors also include complaint and discovery forms.³⁵

Computer Law will appeal to anyone who is just starting out in the computer field. A competent contract attorney will be able to adequately advise his client on what is or is not a good computer contract clause. It should not function as the only source, however. Both *Computer Contract Negotiations* and *Data Processing Contracts* should be consulted to get a more complete view of the contracting process.

As for the other areas of computer law addressed by Raysman

23. *Id.* at 3-35 - 3-37.

24. *Id.* at 3-38.

25. *Id.* at 3-74.

26. *Id.* at 3-65.

27. *Id.* at 3-52.

28. *Id.* at 7-58.

29. *Id.* at 7-62.

30. *Id.* at 5-1 - 5-37.

31. *Id.* at 5-37 - 5-40.

32. *Id.* at 6-16.

33. See, e.g., *id.* at 13-7 ("Claims for Breach of Contract"); *id.* at 13-9 ("Claims for Fraud and Misrepresentation"); and *id.* at 13-19 ("State Deceptive Trade Practice Acts").

34. *Id.* at 13-5 and 13-22.

35. *Id.* at 13-25 - 13-36.

and Brown, *Computer Law* will meet the practitioner's needs. These areas, however, unlike contract law, are volatile and these chapters may soon become dated.